Supreme Court U. S.

OCTOBER TERM, 1897.

Filed Oct. 12, 1897.

THE ST. ANTHONY FALLS WATER POWER COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,

No. 24.

THE MINNEAPOLIS MILL COMPANY,

Plaintiff in Error,

vs.

THE BOARD OF WATER COMMISSIONERS OF THE CITY OF ST. PAUL,

In Error to the Supreme Court of the State of Minnesota.

Brief and Argument for Defendant.

JAMES E. MARKHAM,
Corporation Attorney of the City of St. Paul,
Attorney for Defendant.

Supreme Court of the United States.

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STATEMENT OF FACTS.

By an act of the legislative assembly of the Territory of Minnesota, approved May 23, 1857, and entitled: "An Act to incorporate the St. Paul Water Company," the St. Paul Water Company was organized for the purpose of introducing water into the City of St. Paul from any place or places situate in the County of Ramsey, and to lay water pipes in and through the streets, avenues, lanes, alleys and squares of said city, and to have sole and exclusive right to lay pipes for conducting water in any of such streets, avenues, lanes, al-

leys and squares, and to adopt any other necessary means to furnish water to the inhabitants of said city. This act of the legislature confers upon such corporation the power to secure title to the necessary real estate to be used in connection with the furnishing of water to said city, and also sufficient authority for the erection and maintaining of all the necessary buildings, fixtures and machinery necessary to be used in the operation of such system of water works, and the furnishing of water to the inhabitants of such city.

Ch. 4 of the Laws of Extra Session of 1857, pg. 48.

The original act of incorporation of this company was amended from time to time, granting additional powers and perfecting the rights granted by the original act of incorporation so as to provide a more sure and speedy means of accomplishing the main object intended by the original act of incorporation.

Ch. 61, Special Laws of 1858, pg. 173.
Ch. 74, Special Laws of 1861, pg. 330.
Ch. 83, Special Laws of 1866, pg. 234.
Ch. 119, Special Laws of 1868, pg. 414.
Ch. 120, Special Laws of 1869, pg. 346.
Ch. 103, Special Laws of 1872, pg. 449.
Ch. 139, Special Laws of 1874, pg. 361.

From the time of the original incorporation of the St. Paul Water Company until the purchase of its property, rights and franchises by the City of St. Paul, there was reserved by these various acts to the city the right to consummate such purchase.

See Sec. 9 of the Act of the Legislative Assembly

of 1857, pg. 50 of the Laws of Extra Session of that year, also Sec. 3 of Ch. 119 of the Special Laws of 1868.

Pursuant to the authority vested in the St. Paul Water Company by these various acts of the Legislature, that company established a system of water works for the purpose of furnishing water to the inhabitants of this city, and connected such system with Lake Phalen, a body of water situated about three miles northeasterly from the central portion of the city. That company never extended its water works so as to connect with any other body of water. As the city increased in size and population, the water supply that was furnished by the St. Paul Water Company was inadequate, and proceedings were had on behalf of the city, by virtue of legislative authority, for the purchase of the rights and franchises of the St. Paul Water Company. A law was specially enacted for this purpose, entitled, "An Act to authorize the City of St. Paul to purchase the franchises and property of the St. Paul Water Company, and creating the Board of Water Commissioners," and approved February 10, 1881, (Special Laws of 1881, Ch. 188). This act was amended in some minor respects by Chapter 75 of the Special Laws of 1883. Another law to further perfect the right of defendant was enacted in 1885, entitled, "An Act to amend and consolidate an act to authorize the City of St. Paul to purchase the franchises and property of the St. Paul Water Company and creating the Board of Water Commissioners, approved February ten (10), one thousand, eight hundred and eighty-one (1881), and the

act amendatory thereof, approved the twenty-fifth (25) day of January, one thousand, eight hundred and eighty-three (1883)" (Special Laws of 1885, Ch. 110).

The provisions of these various acts last referred to were complied with on behalf of the City of St. Paul, and conveyances were executed by the St. Paul Water Company transferring all of its property, rights and franchises to said city, and a board of water commissioners was appointed, as provided by such acts, and has continuously for more than twelve years had the charge and control of the water works system of the City of St. Paul under and by virtue of said Chapter one hundred and ten of the Special Laws of 1885. This law is comprehensive. The grants of power contained are sufficient to enable this defendant to do all the necessary, useful and convenient acts that may be at any time required to enable it to secure a sufficient supply of pure and wholesome water for the City of St. Paul. The board of water commissioners is given full power and authority to take and convey from any of the sources used by the St. Paul Water Company or which it was empowered to use, and from any other source sufficient to supply the City of St. Paul with pure and wholesome water for all purposes, and for the purposes aforesaid in all things to exercise all the necessary rights, powers and franchises of the said St. Paul Water Company conveyed to the City of St. Paul.

That the said powers of water commissioners may from time to time for the purpose of furnishing a full supply of water to the inhabitants of the City of St. Paul, extend said water works or make new lines of

works and as it shall from time to time so extend its said works or make new lines of works, it may draw water from any lake or creek by means of pipes,ditches, drains, conduits, aqueduct or other means of conducting water, so as to connect said lakes or creeks with its said work, and may erect and construct drains, bulk heads, gates and other needful structures and means for controlling of water and protection, and in general to do any other act necessary or convenient for accomplishing the purpose contemplated by this act.

Whenever at any time said board shall propose to extend its said works so as to connect with any of said lakes or creeks or to divert the water of any stream, creek or body of water, it shall proceed as follows: Said board shall cause to be made a survey of the land along which it shall so propose to extend said work, and of all lands and other property to be affected by flowage, drainage or otherwise, and for that purpose it may, by its officers and agents enter upon any lands doing no unnecessary damage thereto. After such survey shall have been made, and such line located, it shall cause to be made a map showing the location of said line and the lands necessary to be taken for such extension, and of lands and other property to be affected by the drainage or otherwise. Said map shall be acknowledged by the surveyor making the same and by the president of the board of water commissioners, and shall be filed as a record in the office of the register of deeds of the proper county, and after making compensation as hereafter provided to the owners of or persons interested in the land so to be taken, and for damages by reason of diverting the water of

any creek, stream or body of water, said city shall have an easement in said land designated on said map for all purposes contemplated in this act, which said easement shall include the right to passage, without doing unreasonable damage, from any public highway to and from the land included or covered by said easement.

Provision is made by subsequent sections of this act for the application to the district court of the county wherein the lands are situated for the appointment of commissioners to assess the damages for the land so taken, also provides for the giving of notice of their meeting to make an award of damages on account of the lands which are condemned for the use of the board of water commissioners. Provision is also made for an appeal by the party whose land has been condemned from the award made by such commissioners to the district court of the county in which the lands are situated. and by Section ten it is also provided that whenever the board of water commissioners file their maps as required by Section seven of this act, the board shall be deemed to be in possession of the lands and right of way as represented on their map or maps, or of any other lands they may occupy or have damaged in the construction of their works for the purpose of introducing and supplying the City of St. Paul with pure water, either by flowage, drainage or otherwise, either by consent of the owner or owners, or not, of the land used or occupied that is not shown on their map or maps that the owner or owners have not been settled with nor the lands paid for as required by Section eight of this act and then provision is made for the

maintaining of actions by parties whose land has been taken and which has not been condemned. In such actions the board of water commissioners is permitted to then contest the right of the party claiming to recover the land and in case such party shall succeed in establishing the title, to ask to have the same condemned in the same proceeding and a full procedure for this purpose is established. The subsequent sections of the act provide more in detail for the operation of the water works system of the city, the regulation, distribution and use of the water in said city.

As has already been stated, the water furnished to the city by the St. Paul Water Company was all taken from Lake Phalen, situated northeasterly from the business portion of the city. Because the supply furnished from that source was insufficient, the board of water commissioners surveyed and located a new line of works extending to a system of lakes and in a northwesterly direction from the City of St. Paul, and that board has been furnishing the city with water from this new water supply for a number of years. During this time it has also maintained the former system and has also furnished water to a large portion of the city from Lake Phalen. These two systems are entirely independent of each other. The water flowing into Lake Phalen never would, under any circumstances, flow into the lakes lying northwesterly of the city and which are also used.

In connection with the system of lakes lying northwesterly of the city and from which water is drawn to supply the city, the defendants secured title to a tract of land lying on the

southerly shore of Lake Baldwin, a small inland lake in Anoka county, and the defendant erected a pumping house upon the shore of that lake and during the years 1890, 1891 and 1892 pumped small amounts of water from Baldwin Lake to a point a short distance south therefrom and whose elevation is considerably higher than the surface of Baldwin Lake, and also the territory lying in the vicinity of Pleasant Lake. From this elevation the water flowed through an open ditch to Charles Lake, which is connected with the other lakes northwesterly of the city, and from which water is supplied, as has been stated.

The plaintiff, the St. Anthony Falls Water Power Company, was incorporated pursuant to the provisions of Chapter 137 of the Laws of Minnesota of 1856, being an act entitled "An Act to incorporate the St. Anthony Falls Water Power Company," and was approved February 26, 1856.

See page 215 of the Laws of Minnesota of 1856.

That Company was authorized for the purpose of the improvement of the water power above and below the falls of St. Anthony to construct and maintain dams, etc., to the center of the river. This power is incidental to the main powers of the corporation granted by Section one.

The plaintiff, the Minneapolis Mill Company was incorporated pursuant to Chapter 45 of the Laws of the same year (see page 236) entitled, "An Act to incorporate the Minneapolis Mill Company," and approved February 27, 1856, the day following the approval of the act incorporating the St. Anthony Falls Water Power Company. Substantially the same powers are

given the Minneapolis Mill Company as are granted the other company.

Section eleven of the later act provides that it may be amended by any subsequent legislative assembly in any manner not destroying or impairing the vested rights of the corporators, and providing that nothing in such act contained shall be so construed as to authorize said corporators to interfere with the rights and properties of any other person or persons whatever. The same proviso with respect to interfering with the rights and properties of other persons is also found in Section nine of the act relating to the St. Anthony Falls Water Power Company.

By Section twelve of the later act it is provided that nothing contained in the act entitled "An Act to incorporate the St. Anthony Falls Water Power Company," shall be so construed as to allow the said St. Anthony Falls Water Power Company to maintain or construct dams or of extending beyond the center of the channel of the Mississippi River from the western bank of Hennepin island and said St. Anthony Falls Water Power Company is restricted in the exercise and power of the powers and privileges granted by the ninth section of said act, to the space between the western bank of said island and the center of said river, and providing that the dams shall always be provided with suitable slides and sluices so as to permit the passage of logs and timber down the Mississippi River, AND THAT ANY FUTURE LEGISLATURE MAY AMEND THIS ACT OR THE ACT TO WHICH THIS SECTION IS AMENDATORY, and

provided further that the Minneapolis Mill Company shall be restricted in its operations to the center of the same channel of the Mississippi River as to the property belonging to said company.

Under the authority conferred by these acts and the amendments thereto, the plaintiffs have each constructed dams in the Mississippi River at St. Anthony Falls. The St. Anthony Falls Water Power Company having erected a dam from the east bank of the river to a point in the channel of the river to connect with the dam erected by the Minneapolis Mill Company from the bank on the west side of the river to the channel of the river, and each company has since, and has for many years maintained the dam erected, together with the necessary appurtenances connected therewith for the purpose of furnishing water power to manufacturing industries situated in the locality of these companies' property, and these plaintiffs now claim that they have the right to use all of the water that might at any time naturally flow in the Mississippi River and past the property of the plaintiffs. The claim of the plaintiffs being so broad that the right which they insist upon is the exclusive right to use all of the waters that would naturally flow in the Mississippi River and over the falls of St. Anthony, and that no person, company, corporation, the State of Minnesota or any of the municipal subdivisions thereof have a right to in any manner interfere with or to lessen the natural flow of water in the Mississippi River over these falls, even if such act is done by the state itself or by any

municipal subdivision thereof duly authorized by the state so to do and to devote the water to public use.

The defendant did, as has been stated, during the years 1890, 1891 and 1892 pump from the Baldwin Lake hereinbefore referred to, small quantities of water ranging from a daily average of two million and six hundred thousand gallons per month to ten million, two hundred sixty-six thousand and six hundred gallons. The largest amount that was pumped was in July, 1891; the smallest quantity being in the month of March, 1890. The plaintiffs claim that by virtue of this act on the part of defendant the amount of water flowing in the Mississippi River and over the falls of St. Anthony was diminished to ninety-five per cent of the quantities pumped by the defendant and thereby lessened the amount of water power which might be utilized at the dams of the plaintiffs.

ARGUMENT.

The record shows that two questions have been raised which will doubtless be urged as giving this court jurisdiction to entertain this case. They are found in the petition of the appellants for a reargument in the Supreme Court of the State of Minnesota, pages 79 to 84 of the printed transcript of the record.

First: That by the act to authorize the people of Minnesota to form a constitution and state government, approved February 26, 1857, and by the acceptance of that act, the right to use the waters flowing in the Mississippi river is limited and can only be used

for the purpose of navigation; that is, that the Mississippi river shall be a common highway and forever free as well to the inhabitants of the state of Minnesota as to all other citizens of the United States, and that all waters that would naturally flow in said river shall be permitted to flow there without diminution or diversion of any of the same irrespective as to the quantities that would naturally flow in such river, and irrespective of the purposes for which the same should be used.

It would seem, however, that irrespective of this claim that the plaintiffs in order to succeed must also insist that by reason of their being owners of land on the banks of the Mississippi river, that they have the absolute right to insist that all the waters naturally flowing into said river should perpetually flow there and that the right so claimed is a property right existing by virtue of the act referred to.

Second: The second claim is that the waters which have been taken from Baldwin Lake have been devoted to private use, and that as the taking of private property of one person for the private use of another person is inhibited by the constitution of the United States, this court has jurisdiction to re-examine into the judgment rendered by the Supreme Court of the state of Minnesota.

But as affecting this second question, it would also seem that it is based upon the supposed property rights referred to

Unless one or both of these propositions of plaintiffs be true, they have no standing in this court and the writ of error must be dismissed.

ARGUMENT ON QUESTION OF JURISDICTION.

I.

The first question which arises for consideration, is whether this court has jurisdiction to re-examine the judgments rendered in the Supreme Court of the state of Minnesota in these actions.

This jurisdiction, if it exists at all, must exist by virtue of some statute of the United States, and to determine this question, it is necessary to refer to the provisions authorizing the re-examination of judgments of the state courts by this court, but before doing so we desire to emphasize the fact that the rights which the plaintiffs have, if any, and which they are seeking to protect in these actions, are rights which exist because they are riparian owners upon the banks of the Mississippi river, and while it may be argued that such rights are protected in some manner by the constitution and laws of the United States, we insist at the outset that the rights which they have as riparian owners must be determined by the common law. Such rights are neither created nor do they exist by virtue of the constitution or any of the statutes of the United States, neither do they exist by virtue of the constitution or any of the statutes of the state of Minnesota, and in order to establish what the rights of these parties are as riparian owners, resort must be had to the common law, and if such is the case, as insisted by the defendants, the plaintiffs will have no standing whatsoever in this court. These actions were brought in the state court, and the state court has decided what the rights of the plaintiffs are as riparian owners upon this

stream, and while if these actions could have been brought in the United States court a different conclusion might have been reached as to the common law with respect to such rights, this court cannot re-examine the judgment of the Supreme Court of the state of Minnesota on those grounds, and while it is doubtless the doctrine of this court that as to questions of general law the United States court, sitting within and for any of the states, is not bound to follow the law of such state on such questions, it is equally true that when a party has brought his action in the state court to have his rights determined, and which rights must be determined by the principles of the common law, the decision of the state courts on those questions are binding upon the party, and can not be reviewed or re-examined by the courts of the United States.

II.

The plaintiffs called the attention of the Supreme Court of Minnesota, in their petition for a reargument, to the act of congress passed February 26, 1857, entitled "An act to authorize the people of Minnesota to form a constitution and state government preparatory to their admission into the Union on an equal footing with the original states," and particularly section two of said act, fixing the jurisdiction of the state of Minnesota over the Mississippi river and all waters tributary thereto, and section three of article two of the constitution of the state of Minnesota accepting and ratifying said act of congress. It has never been considered that the act authorizing the people of Minnesota to

form a state government was ever designed to modify the general principles of the common law relative to the rights of riparian owners upon navigable streams, or other navigable waters.

The act referred to provides by the first section what shall be the boundary of the state of Minnesota, and authorizing the people within such boundary to form a constitution and state government, and to come into the Union on an equal footing with the original states, according to the federal constitution.

Section two, in the first instance, is a grant of jurisdiction to such state. That is, the state of Minnesota shall have concurrent jurisdiction on the Mississippi river, and all other rivers and waters bordering on said state of Minnesota, so far as the same shall form a common boundary to said state, and any state or states now or hereafter to be formed or bounded by the same.

(It is not necessary at this time to consider what the jurisdiction of the state would be on such river aside from this act, but the state having been given such concurrent jurisdiction, its authority in all criminal and civil matters and other public matters, is equal to the other states bordering on such river.)

The second part of said section provides that said river, or waters leading into the same, shall be common highways and forever free as well to the inhabitants of said states as to all other citizens of the United States, without any tax or duty, imposts or toll therefor. That is, the United States government has reserved these rivers for the purpose of navigation, and for such purposes they are free, and the United States government has undoubted authority over such rivers

for the purpose of maintaining them as common highways, and authority to prevent any act which will interfere with the navigation of such rivers. Further than this the United States government has not reserved any control over the Mississippi river, nor has it granted any rights to any person in the waters thereof.

Section three provides for the election of delegates to a convention for the purpose of forming the constitution.

Section four provides for the taking of the census in case such convention shall decide in favor of the immediate admission of the proposed state into the Union; also provides for members of the house of representatives.

Section five provides for five propositions to be acted on by the people of Minnesota in such convention, and that if accepted by the convention they should be obligatory upon the United States and upon the state of Minnesota. The first one is in regard to the granting to the state of two sections in every township of the public lands to the state for the use of the schools of the state. The second provides for the setting apart of seventy-two sections of land for the use and support of a state university. The third proposition is for the granting to the state ten entire sections of land to be selected by the governor for the purpose of completing the public buildings, or for the erection of others, at the seat of government of the state. The fourth proposition relates to the granting of the salt springs within the proposed state, not exceeding twelve in number, with six sections of land adjoining or as contiguous as

may be to each, to the state for its use, while the fifth proposition provides for the paying to the state five per cent of the proceeds of the sale of public lands, for the purpose of making public roads and internal improvements. All of these propositions are on the condition that the said convention, which shall form the constitution of said state, shall provide by a clause in said constitution or an ordinance, irrevocable without the consent of the United States that said state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations congress may find necessary for securing the title in said soil to bona fide purchasers thereof, and that no tax shall be imposed on the lands belonging to the United States, and that in no case shall non-resident proprietors be taxed higher than residents.

It is impossible to find anything in this act relating to riparian rights. There might doubtless be certain questions rising under some of the propositions contained in the fifth section which would give rise or regulate private rights and which are protected by the act, but those matters are specific. The question as to the rights of riparian owners, whether on public or private waters, as has been before said is determined by the principles of the common law, and it is hardly to be imagined that in an act authorizing the formation of a state government which is designed primarily to confer and establish jurisdiction upon the people of such state and to preserve intact in the territory about to be formed into a state certain fundamental principals of government which have become settled principals of our national jurisprudence, that congress

should undertake to establish or regulate the rights of riparian owners upon navigable or non-navigable waters. Such rights have been enunciated from time to time with the growth of the common law, and it has never been contended by the people through their representatives in congress or in any assembly ever called to discuss the fundamental principals of our government that the common law is in any way defective with respect to such rights, and therefore it must be plain that the act referred to does not create or establish any rights in the plaintiffs as riparian owners.

III.

Referring now to the statute it will be seen that this court has no jurisdiction, unless in the decision in the state court there "is drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision is against their validity," or there "is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity," or unless some "title, right, privilege or immunity is claimed under the constitution or any treaty or statute of or commission held or authority exercised under the United States and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

Upon an examination of the record it will not be found that the trial court or the Supreme Court of the state of Minnesota ever passed upon any question such as to give this court jurisdiction, nor was the attention of those courts at any proper time ever called to any such question. The first intimation that the Supreme Court of Minnesota had that the plaintiffs claimed some right which might possibly give this court jurisdiction, was upon their petition for a rehearing after the decision of the case by the Supreme Court of Minnesota (see page 80). The opinion rendered by the Supreme Court of Minnesota determines two questions stated in five propositions in the syllabus of the decision. That court determines first, what are the rights of the plaintiff as riparian owners on the Mississippi river as against the defendant, and second, that the provisions of the charter of the defendant do not contemplate the providing of compensation to riparian owners on navigable or public streams. No other questions were in reality decided by the Supreme Court of Minnesota. Neither one of these questions has anything to do with any title, right, privilege or immunity claimed under the constitution of the United States or any treaty or statute of or commission held or authority exercised under the United States.

In view of the many decisions of this court, it seems hardly necessary to argue this question, but as it must necessarily be urged that this court has jurisdiction, this question must be examined into to some extent. The defendant claims, first, from the provisions of the statute referred to and what appears from the record,

that the writ of error in these cases must be dismissed for want of jurisdiction in this court to re-examine the final judgment of the Supreme Court of Minnesota because the plaintiffs did not in that court draw in question any statute of the state upon the ground that the same was repugnant to the constitution of the United States, nor specially set up or claim in that court any right, title privilege or immunity under the constitution or any statute of the United States.

Looking into the record of this case it is not to be found that any reference is made in the court of original jurisdiction to the constitution of the United States or any statute thereof, nor can it be inferred from the opinion of the Supreme Court of Minnesota that that court was informed by the contention of the parties that any federal right, privilege or immunity was intended to be asserted, and from anything that appears in the record the state court proceeded in its determination of the cause without any idea that it was contemplated that that court should decide a federal question. There are a few well settled principles which we regard as covering and controlling the facts before us, and a statement of these with a construction of certain parts of the act under which respondent's board was authorized to obtain further and other sources of water supply will dispose of these appeals, and in the determination of this question of jurisdiction it must be taken as an undoubted fact that no federal question was presented at any time unless upon the petition for a rehearing.

Attention is called to the case of Oxley Stave Com-

pany against Butler County, 166 U. S. 648. This court said in that case, that

"This court may re-examine the final judgment of the highest court of a state, when the validity of a treaty or statute of, or an authority exercised under the United States in drawn in question and the decision is against its validity, or when the validity of a statute of or an authority exercised under any state is drawn in question on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was 'specially set up or claimed' in the state court as belonging to such party under the constitution, or some treaty, statute, commission or authority of the United States."

This court, after referring to the facts in that case as to whether or not any federal question was "specially set up or claimed," stated that "this question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the judiciary act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States. The words

'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare, and unless he does so declare 'specially,' (that is, unmistakably), this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. Brown v. Keene, 8 Pet. 115; Robertson v. Cease, 97 U. S. 646-649. Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

It would seem from the statement of the opinion in this case that when it was argued there were some indications that the decision of this court upon this subject had been misapprehended, and the court reviews its decisions in that respect and arrives at the conclusions which have been quoted.

In the case of Levy v. Superior Court of San Fran-

cisco, 167 U. S. 175, reference is made to the case referred to above as follows:

"We said in Oxley Stave Company v. Butler County, 166 U. S. 648, that the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from inference but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right."

As has been stated, it will doubtless be claimed that a federal question was raised when the plaintiffs petitioned the Supreme Court for a rehearing. If any federal question was raised by such petition, that question was raised too late so far as the rivisory power of this court is concerned. The case of Pim v. St. Louis, 165 U. S. 273, is, so far as the assertion of a federal right by a petition for a rehearing, identical with these cases, and this court in its opinion in that case say:

"Upon inspecting the record we find that no federal right was set up or claimed in any form until after the final decision of the case by the Supreme Court of Missouri, and that by petition for rehearing. This petition was overruled by that court without any determination of the alleged federal question, indeed, without any illusion to it. The claim of a federal right came too late so far as the revisory power of this court is concerned. Loeber v. Schroeder, 149, U. S. 580-585; Sayward v. Denny, 158 U. S. 180-183."

On the other hand, unless the decision of the federal

question raised in the state court is necessary to sustain the judgment, this court will not review such decision.

In the case of Dibble v: Bellingham Bay Land Company, 163 U. S. 63, it is stated that, "If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution of the United States, and another question not federal has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question to sustain the decision, this court will not review the judgment. Eustis v. Bolles, 150 U. S. 361, 366."

"If it appears that the court did in fact base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction. Klinger v. Missouri 13 Wall 257."

In Fowler et al. v. Lamson et al., 164 U. S. 252, the court in discussing this question of jurisdiction say: 'Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction. Zimman v. Nebraska, 116 U. S. 54.'

"It has also been frequently decided that to give this court jurisdiction on writ of error to a state

court, it must appear affirmatively not only that a federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause and that it was decided adversely to the party claiming a right under the federal laws or constitution, or that the judgment as rendered could not have been given without deciding it. Eustis v. Bolles, 150 U. S. 361; Powder Works v. Davis, 151 U. S. 389-393; Railway Co. v. Fitzgerald, 160 U. S. 556-576.

In the case of Egan v. Hart, 165 U. S. 188, it is stated by the court that "It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any federal question, they were without jurisdiction, although the state court may have also decided such a question."

It seems to necessarily follow from the provisions of section 709 of the Revised Statutes of the United states referred to as interpreted by this court in numerous decisions, that no federal question was ever presented to the state court for a determination, and that the attempted presentation to the state Supreme Court of the state of Minnesota on a petition for rehearing came too late to give this court jurisdiction to re-examine the judgment of that court. Furthermore, that court has never determined any federal question adversely to the plaintiffs in these actions. It hardly could have done so for no such question was ever raised in the state court. The facts presented in the records in this case are sufficient to sustain the judgment of the state court without reference to any federal

question. The principal question involved in these cases was as to the rights of the plaintiffs as riparian owners upon the banks of the Mississippi river. This was determined adversely to the claim of the plaintiffs, and no federal question arises in the determination of those rights. The determination of the Supreme Court of Minnesota that by the act creating the defendant in this action, it was not required to make compensation to parties owning land on navigable streams and bodies of water, does not involve any federal question. It is simply a question of the proper interpretation of that statute, and such interpretation will be followed by this court.

For these reasons the writ of error in these cases to the Supreme Court of the state of Minnesota must be dismissed.

ARGUMENT ON THE QUESTION OF RIPARIAN RIGHTS.

The defendant claims that the decision of the Supreme Court of Minnesota in sustaining the rulings of the trial court is correct for the reasons given in the decision, and for other reasons equally cogent, which the defendant now present. We would summarize the points as follows:

1. The state has power to divert the waters of a navigable stream for public purposes without regard to incidental injuries to private persons. Consequently it has the right to do so from the Mississippi river; for at the point in question it is navigable, and plaintiffs

have title to low water mark only, while below low water mark the state owns the river bed.

II. Plaintiffs maintain the mill dams in question only by license from the state, and their claim of injury depends upon alleged property rights arising solely and resting absolutely upon the maintenance of their dams. The right to dam the Mississippi river originating and existing only by the bounty of the state,—by its license,—the state may at any time revoke that license or curtail its benefits. This prerogative it has exercised in granting the defendants the right to take water from any lake or stream which might or might not contribute its waters to the Mississippi. The plaintiffs therefore have no rights against the state, even if they might have rights against private persons.

III. The plaintiffs cannot claim the rights of a riparian owner. The rights alleged to be infringed depend upon the maintenance of the mill dams. The rights of a riparian owner depend upon his ownership of land on the stream and his use of the land under water and opposite his own land. Plaintiffs' mill dams extend 650 and 900 feet up stream and beyond any land owned by them, and without this extension they would be useless.

IV. The right of the state is sovereign, not proprietary, as plaintiffs well urge. Therefore the state granted no property rights in the bed of the stream to plaintiffs, nor does the state attempt to grant such right to defendant. The state merely permitted plaintiffs to use the bed of the Mississippi river with its in-

cidental privileges until it saw fit to limit those privileges by using them for itself. Defendant is not a grantee but a part of the state itself.

V. The use of the water by defendant was trifling and was a reasonable use.

VI. The use of water by plaintiffs was not on their land nor for conducting their own work. A claim of right based upon a system of conducting water to be used on the land of many other persons, not riparian owners, should not be considered either as a riparian or conventional right against an upper owner using the water for a legitimate and reasonable purpose.

VII. The dam of each plaintiff depends upon the maintenance of the dam of the other plaintiff for its usefulness. Each plaintiff depends upon the other for property rights which, it alleges, defendant has infringed. If either plaintiff should open its gates or remove its dam the other could not complain, but the property in the use of the water which it now claims against the world would disappear.

VIII. Defendant is a municipal corporation—a branch of the state government. The use of the water by defendant is a public use. The state has granted the right to defendant to obtain its supply of water from the lakes and streams in question.

IX. The acts creating the defendant and authorizing it to take water from the lakes and streams tributary to the Mississippi river is amendatory of, and a modification of the acts incorporating the plaintiffs, in so far as

those acts granted any rights to use the water of that river.

X. That as the only right the plaintiffs have to use the water of the Mississippi river for furnishing power, depends upon the right given to erect and maintain dams, any subsequent act of the legislature authorizing the use of any water tributary to the river for any public purpose is necessarily a modification of the rights granted the plaintiffs to make use of such waters, even if the value of the use of such waters by plaintiffs is entirely destroyed, and such right on the part of the legislature to authorize such use of the waters by defendants is reserved in the act approved February 27, 1856.

XI. It is not competent for the state to grant to privae parties or corporations any right to use the waters of the public lakes and rivers which will prevent the subsequent authorization of the use of such waters for public purposes and without compensation.

I.

The state has power to divert the water of a navigable stream for public uses without regard to incidental injuries to private persons. So it has this right in the Mississippi river, which is navigable, the state owning the bed below low water mark.

In the work ascribed to, Lord Hale, "De Jure Maris," recognized as the primary and authoritative exposition of the English common law on riparian rights, it is laid down as the law that fresh rivers of whatever kind,

do of common right belong to the owners of the soil adjacent, so that the owners of either side have the proprietorship of the soil, and consequently the right of fishing *usque filum aquae*, respectively, and if one is the owner of both sides he is the owner of the whole river, and has the right of fishing, according to the extent of his land in length; but the king has the right of property in the sea and its shore, and all arms of the sea where the tide ebbs and flows, including rivers below tidal mark. Lord Hale appears also to sanction the doctrine that the public has a common right of passage for vessels, barges and boats in all rivers, whether fresh or salt, whether the soil be the king's or not, and that the king has jurisdiction to reform and punish nuisances, whether in fresh or salt rivers. But he distinguishes navigable and non-navigable rivers according as they are salt or fresh.

Gould on Waters, sections 6, 51.

People v. Canal Appraisers, 33 N. Y. 469-471.

There are some early English cases which appear to hold rivers to be navigable, or at least subject to the public easement of passage above the tidal mark, but it seems to be the better and consistent opinion that such public rights on fresh rivers are exceptions to the rule and based on prescription.

Gould on Waters, sections 49, 51 and 53.

This old English doctrine distinguishing navigable from non-navigable streams with consequent distinctions in the proprietorship of the bed of the stream has caused much confusion and many different holdings in the courts of the United States where the reverence of

the judges for the common law has made it hard for them to conform their decisions to the necessities arising from the different physical formation of a large inland country. But the English law and its distinctions must be kept in mind in reviewing the decisions of the courts of this country as regards their application to the cases at bar; for, in doing so, we trace the reasons for the decisions and can show when they are applicable and when they are not; and language quoted from them has quite a different effect when read in the light of the questions in controversy, and the conditions and law peculiar to each state, from which it would have if defining doctrines of universal application.

In this state it is well settled that the Mississippi river is a navigable stream, and the riparian proprietor takes only to low water mark, the ownership of the bed of the river remaining in the state.

Morrill v. St. Anthony Falls Water Power Co., 26 Minn. 222.

Hanford v. St. Paul & Duluth R. R. Co., 43 Minn. 111-112.

Union Depot Co. v. Brunswick, 31 Minn. 301.

The interruption of navigation in the vicinity of St. Anthony Falls does not take away the navigable character of the stream; for a river navigable in its general character does not change its legal characteristics by a disturbance which at a given point, breaks the continuity of the actual navigation.

Matter of State Reservation at Niagara, 37 Hun. (N. Y.) 537.

This appears to be so well settled, and the reasons for it so conclusive, based as they are on the ordinance of 1787, the public acts of congress, and the course of the government in the public surveys that when we add to all this the actual fact of the navigability of the river for logs, at least at St. Anthony Falls (Lamprey v. Metcalf, 53 N. W. 1143), that it is with some surprise we note the contention of the plaintiffs to the contrary. If half a mile of the river near plaintiffs property were to be held not navigable (as they contend it should be) we must hold all the river above that point to be non-navigable or else chop it up into small parts varying with the depth of the water or the rocks in the channel, holding this to be navigable and that not; the public to have a right to fish here and not there—all which leads us to believe that plaintiffs claim in this respect is not meant to be serious.

While it is true that there can be no absolute property, in particular water, considered as so many drops or gallons, because it is fleeting, runs away, turns to vapor and falls again elsewhere, yet the usufructuary right in water amounts to the same thing as ownership of it whenever such right exists; the water flowing out is constantly replaced by other flowing in, and the body of water existing in a certain place, whether it consists of the same particles or not, is subject to all the uses which ownership of it could give were it the subject of ownership. So we frequently see it stated that ownership of a bed of a stream gives ownership of the water above it.

So Davies, judge, in People v. Canal Appraisers, 33 N. Y., says: "The title to the land or bed of the river

undeniably carried with it the water that flowed over it."

We think that it is a vital point of distinction in the case at bar, that the state owns the bed of the river, and therefore has a paramount right to the use of the water for public purposes. Plaintiffs contest this, and say that this involves a claim that the state holds by a double sort of title, a *jus privatum*, as well as *jus publicum*, and cited in the court below, Bradshaw v. Duluth Imperial Co., 52 Minn. 59, to the effect that the *jus privatum* or right of private property in navigable watters and their shores claimed by the crown, which it could alienate to a subject, has no place in the jurisprudence of this state; that the rights of the state in navigable waters and their beds are sovereign, and are held in trust for the public as a highway and incapable of alienation.

We have never claimed that the *jus privatum* distinct from the *jus publicum* existed, or that the rights of the city in the cases at bar are at all dependent on it, and we repudiate any such position. It is well to bear the point in mind, however, as plaintiffs must appeal to the doctrine of *jus privatum* to sustain any claim of water right based on the existence of their dams on the property of the state. We do contend, however, that the *jus publicum* is much broader than the mere right to navigate a river.

The real question at issue is what is involved in the term "riparian right." If the property in the bed of the stream gives the state certain rights which plain-

tiffs as "riparian" owners merely do not have it matters not to them, when seeking to enforce only their "riparian rights," what the state has seen fit to do with its rights as owner of the river bed.

What, then, are "riparian" rights, and what rights are appurtenant to ownership of the bed? "Riparian" rights attach to the bank as distinguished from the bed.

Gould on Waters, section 148.

Are all rights in a navigable river "riparian" rights except the mere right of passage up and down the stream, as plaintiffs would have it believed? For instance, they have said: "The right to which the riparian owner's property is said to be subject is simply the sovereign right of the state to control the use of the waters for navigation." Also "With the ownership of the land go the riparian rights, and subject to the right which the state has, these riparian rights include the right to use the water for manufacturing purposes in connection with whatever faculties the riparian owner may construct for the purpose of utilizing the water to its full extent."

Defining a riparian right as a right which appertains exclusively to the ownership of the bank as distinct from the bed of the river, what sort of a right is that of fishing? "Does the exclusive right to fish arise from ownership of the bank?" It certainly does not; for it is confined to those cases where the owner of the bank owns the bed also, and in the case of opposite owners each owner is confined to the side of the stream

on which his land lies. When the state owns the bed the right of fishing is common to the public because the state holds in a sovereign capacity and in trust for the public. There is no strict *jus privatum* here, nevertheless a right exists in the public to fish opposite the riparian owner's land, and the latter's right to fish is not "riparian," but only a right to fish in common with the state's citizens because he is one of them. Because the *jus privatum* or exclusive proprietorship of the state in the fisheries apart from its trust for the public is not law, it does not follow that the "riparian" owner gets the right to fish with others because of his riparian land. He has no riparian right of fishing. When the exclusive, personal right of fishery in the crown or its grantees faded away, the public, not the "riparian" owner stepped in.

Taking the case of a non-navigable stream, where the exclusive right of fishing is in the owner of the bank, we must say that he has the right as owner of the bed of the stream, and not as a "riparian" right, unless we are prepared to depart from our definition of a "riparian" right as one attaching to ownership of the bank as distinguished from ownership of the bed. Let us not confuse the word when applying the decisions of other cases, or rather, let us discover the sense in which it is used. So with the right to maintain structures in the bed of the river. Is that a "riparian" right or does it follow from ownership of the bed? There is a class of cases which hold that, inasmuch as the state owns the land below high or low water mark, as the case may be, that it can authorize the placing of structures

in front of the riparian owner and beyond the limits of his fee, without compensation to him.

Gould v. Hudson River R. R. Co., 6. N. Y. 522.

McManus v. Carmichael, 3 Ia. 1.

Tomlin v. Dubuque, B. & M. R. R. Co., 32 Ia. 107.

That doctrine is not the law in Minnesota (Union Depot v. Brunswick, 31 Minn. 300), but the reasoning of those cases is conclusive that the state has the exclusive control of the bed of the stream, and the only modifications of the doctrine, in this state or any other, is that the right of *access* to the water is a "riparian" right, and as far as the point of navigability "the riparian" owner may build structures, or make a fill in the water, for the purpose of reaching the water when it is navigable, and for that reason only, and because such right is incidental to access to the stream is the doctrine of the cases above cited modified. We feel safe in saying that apart from such modification the doctrine of those cases should be sustained. They have been in effect, though not specifically by the Supreme Court of Minnesota. (Union Depot v. Brunswick, 31 Minn. 300.) And although the right of the bank owner may have been called "riparian," it seems plain that it is not "riparian" in its true sense, but only in the sense that it is a necessary means to protect a true "riparian" right, viz., the exclusive right to land on or embark from one's own shore land.

A structure then beyond the point of navigability cannot be maintained as a "riparian" right. Unless licensed it is a "purpresture," and if an obstruction to navigation, both a purpresture and a public nuisance.

Union Depot v. Brunswick, 31 Minn. 300.

But take the case of a non-navigable stream. The bank owner can build a dam to the center of the stream or clear across if he owns both sides, and provided he does not overflow other than his own land no one can say him nay. Is this a "riparian" right, or does it proceed from ownership of the bed of the stream?

Again, the cutting of ice on a river or pond is a public right or a private right, according as the public or bank owner holds the fee of the bed of the stream.

In Massachusetts the right to cut ice on the great ponds is common; but the great ponds belong to the state by early colonial enactment.

Gould on Waters, section 191.

The owners of the land bordering on navigable streams in those states where they are held to be public property have no title to the ice which forms on such streams, as incident to the ownership of the banks, but the ice belongs to the first appropriator.

Wood v. Fowler, 26 Kan. 682.

Hickey v. Hazard, 3 Mo. App. 480.

Ice forming on a navigable fresh water stream, the bed of which belongs to the riparian proprietors, is their property.

Washington Ice Co. v. Shortall, 101 Ill. 46.

(In Illinois the riparian owner takes the fee to the middle of the Mississippi river.) Ice forming on private fresh water streams and ponds belongs exclusively to the riparian proprietors, who may prevent its re-

moval by others or maintain trespass against those who cut it without license.

Mill River Manfg. Co. v. Smith, 34 Conn. 462.

Edgerton v. Huff, 26 Ind. 35.

State v. Pottmeyer, 33 Ind. 402.

Lorman v. Benson, 8 Mich. 18.

Payne v. Woods, 108 Mass 173.

These cases make it clear that the right to the ice depends on the ownership of the bed of the stream. If the public owns the bed the right is common; if the bank owner happens to own the bed his right to the ice is exclusive. The right to cut ice, therefore, is not riparian.

It will thus be seen that "riparian" rights, properly so called, are limited, and that independently of the rights acquired by virtue of the ownership of the bed of the stream are merely the right of access to the water, and the right that water should flow past the riparian land. Since the public right of navigation has been the one most in question in the decided cases it has been too much the habit to use language leading to the inference that the public right is restricted to that of passage or navigation, while every other possible use of the water passes to the "riparian" proprietor.

But, analyzing each water right by itself, the "riparian" rights which the bank owner can call upon the law to vindicate, at least against the state and its public agencies, seem confined to the two mentioned.

Diedrich v. N. W. U. Ry. Co., 42 Wis. 248.

Delaplaine v. C. & N. Ry. Co., 42 Wis. 214.

Especially in construing the New York decisions must it be borne in mind that the riparian proprietors own the bed of the stream, with the possible exception of the Mohawk and Hudson rivers, so that about the only rights in that state left in the public outside of these two rivers are the rights resulting from the public right of navigation and its right to protect and improve the water highways.

In the cases of the Canal Appraisers v. People, 17 Wendell, 571, and People v. Canal Appraisers, 33 N. Y. 461, the right of the state to divert water from the Hudson and Mohawk rivers for supplying the Erie canal without compensation to riparian owners, whose water power was affected was distinctly affirmed on the ground that these rivers should be deemed navigable and the waters public waters, and that the right of a riparian owner to the use of the water was subordinate to the paramount right of the public to take it for public use. The body of the decision in each case is devoted to proving that these rivers are navigable, and it is assumed throughout that such being the case the waters are the state's and applicable to public uses regardless of riparian rights.

Plaintiffs in the cases at bar lay great stress on the case of Smith et al. v. City of Rochester, 92 N. Y. 463, as being one almost entirely parallel. In that case the city of Rochester was authorized to take water for city purposes from Hemlock lake, out of which flowed Honeoye creek. The plaintiff utilized a water power on the latter which would be injured by the taking of water from the lake. The lake bed was owned by the

riparian proprietors, and, of course, the bed of the creek was private property. These waters lay in that part of New York which was originally claimed by the state of Massachusetts, which had granted the lands to private parties. Later, the state of New York, to settle the dispute, recognized the right of grantees from the state of Massachusetts, but reserved the rights of public use of the waters. The court held that the grantees from Massachusetts acquired the fee to all the land, including the bed of the lake and the use of its waters, and that the right reserved to the state of New York was only the right of passage for navigation. That this mere right of passage being the only right acquired by New York state, it would be inconsistent with such limited right to hold that it could divert the waters. The doctrine of that case is to be read in the light of these facts ,and it will appear that it has no general application to navigable waters where the rights of bank owners are limited to those which are strictly riparian. In addition to this the plaintiff in that case had his water power on a private stream, running out of the lake, and his rights in it were proprietary as well as riparian rights. So there is really no parallel between that case and the one at bar.

Plaintiffs have also claimed that the case of Sweet v. City of Syracuse, 129 N. Y. 316, sustain their position. But the rights of private owners did not come into the case. The legislature had passed an act to establish and maintain a water department in and for the city of Syracuse, which was authorized for and in the name of the city to acquire, construct, maintain,

control and operate a system of water works to furnish the city and its inhabitants with water from Skaneateles lake, and to acquire all lands, waters and other property necessary for this purpose. The power to exercise the right of eminent domain was conferred and the procedure provided for. Skaneateles lake was 17 miles from Syracuse, and is a body of water 15 miles long and 1 mile wide. It is 453 feet above the Jordan level of the Erie canal, and discharges its water through an outlet known as Skaneateles creek, about 10 miles long, into the Seneca river, thence into the Oswego river, thence into Lake Ontario. The lake has been navigated by steamboats and other crafts, but there is no navigable communication between it and any other waters. The state has acquired the right to the use of the waters of the lake as a feeder to the Erie canal, and by the act in question authorized the city of Syracuse to take the surplus waters of the lake not needed for the use of the canal. The only material question in the case was whether in so doing the state had violated the constitutional provisions that the legislature shall not sell, lease or otherwise dispose of the Erie and certain other canals, but they shall remain the property of the state and under its management forever. That was the only seriously contested point in the case. It is not a fact, as has been claimed by plaintiff in the case at bar, that the court passed on the rights of riparian owners as against the City of Syracuse; it is merely held that if the city became a riparian owner and should put a pipe under the water for the purpose of drawing off such surplus water the pro-

prietary ownership of the state would not be infringed within the constitutional prohibition above quoted.

Neither does the case of Rumsey vs. N. Y. and N. E. R. Co., 133 N. Y. 79 lay down the rule that the state cannot divert the waters from their natural channel for any purpose without providing compensation. That question was not before the Court, and was not referred to. The thing decided was that a riparian owner is entitled to access to the water which cannot be cut off by running a railroad embankment between the upland and the water front, in this respect overruling Gould vs. Railroad Co., 6 N. Y. 522, and conforming to the doctrine of the Supreme Court of Minnesota in Union Depot Co vs. Brunswick, 31 Minn. 300, and Brisbine vs. Railroad Co., 23 Minn. 114. The Court say:

"It may be conceded that the sovereign power in a work for the improvement of the navigation of a public river may incidentally interfere with the enjoyment and use of the water front by riparian owners, but the power to grant to a private individual or corporation the right to cut such owner off entirely from communication with the stream without compensation is quite another and different question."

The case of Yates vs. Milwaukee, 10 Wall. 497, goes no further and decides no other question than the right of access by a riparian owner to the water.

The case of Commissioners of Canal Fund against Kempshall, 26 Wend. 404, has been so often quoted as affecting the ruling in Canal Appraisers vs. The People, 17 Wend. 571, that it is deserving of an extended

review. We maintain that the whole tenor of the argument in that case supports the position that proprietorship of the bed of a stream gives the right to an unqualified use of the water power, and that the whole contention of the opinion is to show that the property owner whose rights were in question was the owner of the bed of the Genesee river. We call particular attention to the statement of facts on pages 401 and 405 of the report which shows the river in controversy was situated in that district of New York where the land was ceded by New York to Massachusetts, reserving only the right and title of government, sovereignty and jurisdiction. It was this state of facts which determined the Court in Smith vs. Rochester, 92 N. Y. 492, cited above to hold that the bed of the lake there in question was held by the owners of the bank. The opinion in the Kempshall case proceeds to state the doctrine laid down by Lord Hale as to fresh and salt water rivers, and to show that even where the public might have acquired an easement for passage or transportation on the larger fresh water streams the riparian owner's right of proprietorship in the bed of the stream with the right flowing therefrom was not affected. It is there shown that the common law rule that non-tidal rivers were private as to all proprietary interests was still the law of New York, and that the case in 17 Wendell, 571, was confined in its operation to the Hudson and Mohawk rivers, which might be well held, it was said, to be public rivers on account of the original patent from the Dutch government, which would be governed by the civil law as to water rights, and on account of the undisputed claim of the

state and colony for a century to the exclusive use of those two rivers for public uses. The decision then goes on to the effect that, except as to the Mohawk and Hudson rivers, the common law must be held to prevail in New York, and as to ownership of the bed of the Genesee river. It is there said by Senator Verplank, p. 418:

"I am, therefore, of the opinion that by the common law still remaining the unrepealed law of this state, the legal title to the portion of the Genesee river where the waters were temporarily diverted by the construction of the aqueduct, was in the proprietor of the adjacent banks, subject only to the uses of navigation so far as those waters were capable of it, and to the rights of other proprietors, above or below, to the use of the stream. The complete right to the usufruct and enjoyment of those waters for milling, or any other purpose to which water or its mechanical power is applicable is appurtenant to the ownership of the soil and banks."

He then says that, even conceding that the Genesee were on a par with the Hudson river still "under the compact of 1786, which settled the long controversy between New York and Massachusetts, concerning the title to a large part of Western New York, this state, by formal deed, ceded, granted, released and confirmed to Massachusetts all the estate, right, title and property (the right of government, sovereignty and jurisdiction excepted) which the former had to a large territory, comprising the whole tract of country through which the Genesee runs, from its sourse to where it flows into Lake Ontario. By a legislative act of Mas-

sachusetts the territory was in 1778 granted to Phelps and Gorham, and became in every sense private property. By the very letter of the compact and grant the whole bed of the Genesee passed as so much land under water, comprehended in the granted territory. The usufruct of water flowing over it is a part of and incident to the fee. There was no exception or saving in the grant, except that of government, sovereignty and jurisdiction. * * * Under this original grant is shown to a regular chain of title in the defendant to certain lots in that tract, bounded in express words on one side by the center of the Genesee, and including land on the adjoining banks."

It thus appears that in so far as the state has rights by virtue of its ownership of the bed of the river, the Kempshall case has no application to those at bar other than to affirm that right of user follows such ownership. The case of Garwood vs. N. Y. Cent. R. R. Co., 83 N. Y. 400, was a controversy between private riparian owners; no question of public use was involved.

In Chenango Bridge Co. vs. Page, et al., 83 N. Y. 178, the property owner held the fee of the river, the only public right being the easement (in New York) of navigation. In this case it is held a private owner holding the fee of the bed of the river may maintain a ferry for his private use in spite of legislative prohibition.

In Meyer vs. City of St. Louis, 8 Mo. Appeals, 266, the City of St. Louis had extended a dike at right angles with the river out 700 feet from shore for use merely as a public street, and thus caused the river to

fill up in front of plaintiff's mill property near the dike, whereby the water became so shallow that he had no access to the river, and his lumber and logs were buried in soft mud. Held, he was entitled to damages.

The Wisconsin cases have no possible bearing here.

In Walker vs. Board of Public Works, 16 Ohio, 540, 544, it is held that the bank owner by the laws of Ohio holds the fee of the bed of the river, and the public has only an easement of passage.

In the case of Piop, 14 L. R. App. Cases, 612, the only question was the right of free access of a riparian owner to the water. It was held that a railroad company could not put a railroad embankment across the water front without compensation to the riparian owner. This was the only riparian right discussed.

Having shown that in New York the ownership of the bed of fresh water rivers, except the Mowhawk and Hudson have, in many cases, been held to belong to the individual and not the state, and that in such case the state there has but a limited easement for passage and transportation, but that as to the Mowhawk and Hudson the public rights are paramount, we will review the case of Black River Improvement Co. vs. La Crosse, 54 Wis. 659.

The Black River Improvement Company was a corporation created by special act of the Wisconsin legislature in 1864, as amended in 1866. In their charter it is provided that this company shall have power and authority to improve the navigation of the Black river and lakes near the mouth of the same, in the Counties

of Clark, Jackson, Trempealeau and La Crosse in Wisconsin by "removing obstructions, building dams, breaking jams, deepening, widening and straightening the channel, closing up chutes and side cuts leading from said river into the Mississippi river and into the bottom lands of said river and into sloughs; to erect dams and piers, to construct levees and dikes, and repair and straighten the banks of said Black river, etc." The defendant, the La Crosse Booming and Transportation Co., was organized under an act of the Legislature in 1872 for manufacturing by steam or water power lumber and wood products and sell the same; also for the purpose of "improving Black river and sloughs for navigation from John Lytle's mill on said river to its mouth and entrance into the Mississippi river by way of the main river and Black Snake river and French slough, for the purpose of booming, driving, rafting, holding and manufacturing logs, timber and other wooden materials for the use of the company or of other persons, * * * also of transporting property of all kinds on the Missippi river and tributaries by vessels and water craft, and to purchase and charter all necessary vessels for towing purposes as common carriers or otherwise upon the Mississippi river or its tributaries, and to charge a reasonable compensation therefor for all booming, rafting, manufacturing, transferring and towing, or other services for other persons, and with powe. to construct such improvements in said streams by way of improving the navigation of the same, and of such booms, piers, piles, assorting works, rafting works, holding grounds for

materials and purchasing and leasing such real estate as said company may need.

The controversy in the case arose out of defendant's attempt to keep open and improve for purposes of navigation what is called in their articles Black Snake river. Black Snake river is in the United States surveys called the West Branch and is, in fact, a part of the waters of the Black river. The Black Snake leaves Black river at a point below Lytle's mill and runs to the west of the main channel of the Black river through low grounds for two miles and then empties into Rice lake. The main channel bears to the east and empties into the same lake. From the lake to the Mississippi in ordinary stages of water all the waters of Black river flow in one stream to the Mississippi. West Branch or Black Snake river was returned as a meandered stream by the United States surveys from where it leaves Black river to Rice lake, and in its original state was useful for running logs, as deep or deeper than the main channel, but not to wide, and more tortuous.

The plaintiff's corporation, as soon as organized and before 1866, closed up the Black Snake river at its upper end where it left the Black river in order to throw more water into the Black river main channel and built a dike or embankment from the mouth of the Black Snake north for half a mile or more, in order more effectually to prevent water from flowing into the Black Snake. The defendant, in 1876, broke down this dike in order to allow the waters to flow into the Black Snake the same as originally.

The questions arising from the case are two: First,

had plaintiff the right under its charter to close up the Black Snake for the purpose of turning its waters into the main channel for the purpose of improving that channel? Second, was it lawful for such purpose without first making compensation to the riparian owners along the line of the Black Snake for any injury they might sustain by the diversion of its waters from its natural course into the main channel?

The Court hold that the terms of the charter authorize the closing of the Black Snake. After citing the canal cases in New York and many others the opinion says:

"These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes in their flow or otherwise, without making compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such waterways are as much subject to the control of the state for the purposes of the improvement of such ways as a highway upon the land. The right of the public to raise or lower the grading of the public street without being required to compensate the adjacent owners is well established by the decisions of this court, and the right to discontinue a highway has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow is as perfect against everybody except the state or some

person or corporation standing in its stead, as it is in the case of unnavigable streams, and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership, and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner. The doctrine of the case above cited has, we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner without making compensation therefor, need not be determined in this case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and what they have done under their charter, and which is complained of the defendant, we think must, for the purposes of this action, be considered to have been done for the improvement of navigation in said river, and as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners of the banks of the Black river or the Black Snake river have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their land."

The full force of this decision is apparent when it is stated that in Wisconsin the riparian owners on navigable streams own the bed of the stream as well.

It has been held in a long series of decisions in Pennsylvania that the public right of the state in the waters of the navigable rivers is paramount, and as against the state a diversion of the water for public improvements is *damnum absque injuria*. Rundle vs. Delaware & Raritan Canal Co., 14 How. 80; Susquehanna Canal Co. vs. Wright, 9 Watts. & S. 101; Monongahela Nav. Co. vs. Coone, 6. W. & S. (Pa.) 101.

In Fay vs. Salem & Danvers Aqeduct Co., 111 Mass. 27, it was held that the waters of a public pond might be diverted to supply a town without compensation to the shore owners, on the ground that the state owned the waters.

In Commissioners vs. Withers, 29 Miss. 21, it is held that the rule of the common law is not applicable to our large public rivers used for navigation, but that the rights of the owners of the lands bounded by such streams are subordinate to the right and power of the state to use and appropriate the waters to the public good in promotion of navigation.

In Lamprey vs. State, 53 Minn. 181, the Court, after holding that the riparian owner takes the fee only to the water line of a navigation lake, says: "Many, if not the most, of the meandered lakes of this state are not adapted to, and probably will never be used to any great extent for commercial navigation, but they are used—and as population increases and towns and cities are built up in their vicinity will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agri-

cultural and even city purposes, cutting ice and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, 250 years ago, reserved to public use her great ponds, probably only fishing and fowling were in mind; but, as is said in one case, 'with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the appropriation. The devotion to public use is sufficiently broad to include them all as they arise.' West Roxbury vs. Stoddard, 7 Allen 158. If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature and adopt the classification of public waters and private waters."

In People vs. Tibbetts, 19 N. Y. 523, it is said: "It is beyond dispute that the state is the absolute owner of the navigable rivers within its borders, and that as such owner, it can dispose of them to the exclusion of the riparian owners."

If it be thought that this decision goes too far in authorizing a private individual to be the beneficiary of the grant, the case is still good as authority that the

state has the paramount right of user for all public purposes.

As bearing out the same doctrine, we cite the case of Tomlin vs. Dubuque B. & M. R. R. Co. 32 Ia. 107.

We thus see from a review of the cases that there is ample authority for holding that riparian rights to use of the water are subordinate to a use of such waters by the state for public purposes of navigation, though such use results in or is best secured by a diversion of the water from its natural course in the stream; that this doctrine holds without question where the state owns the bed of the stream, and in Wisconsin even where the bed is held by the riparian owner. If this riparian right attaching to the bank is thus subordinate to the right of the state to divert it for the public purpose of improving navigation, why on principle should it not be subordinate to any other public use? The paramount rights of public user once admitted for any purpose, what reason can be assigned for limiting the uses, provided they are public and for the common and beneficial use of the people? For whence the paramount public right at all? The question could scarcely have arisen at common law, for it is not easy to conceive of diverting the water from an arm of the sea, with the whole ocean to supply it. But it seems, on principle, that ownership of the land under the water must have given the royal right of usufruct to all the water over it, paramount even to exclusion if need be, on the same theory that it gave the exclusive right to maintain structures thereon for the public use or the exclusive right of fishing or ice

cutting. Though the *jus privatum* of the state is controlled by the *jus publicum* it remains nevertheless the proprietary right of the state, the only difference being that it is a right held in trust for all the public and incapable of alienation for private purposes or to private persons. (Gould on Waters, Sec. 17-21.) The extent of the right of property in the state never changed, though the power of the state to alienate it or to use it except for the public has since been taken away. In that sense the proprietary right has merged into the sovereign right. If the crown had ever a paramount right of usufruct, the state has it still; and if it has such right for any purpose, it must be a general paramount right for all purely public uses.

Though it has been said that the riparian right of user of water flowing past the bank is derived from ownership of the bank as distinguished from the bed, yet the bed and the bank may be in different owners, and even a riparian owner holding the bed as well as the bank may severally grant the bed; and in either of these cases has it ever been held that the usufruct of the water did not vest in the proprietor of the bed as well as the owner of the bank? Has it ever been pretended that since a "riparian" owner has a right of usufruct in the water, it is exclusive, and that the same right does not attach to the owner of the bed of the stream by virtue of his proprietorship of the bed? Is not the ownership of the land under the water an independent source of title to usufruct of water, as independent as that attached to the bank? Is it not even the original source? The general definition of

land includes everything above or below, including water. 2 Blackstone Com. 18; 1 Washburn Real Property; McManus vs. Carmichael, 3 Iowa 29. So ice forming in the stream belongs to the owner of the bed. State vs. Pottmeyer, 33 Ind. 402; Wood vs. Fowler, 26 Kan. 682; Hickey vs. Hazard, 3 Mo. App. 480. And when the state, the primary source of title, retains its ownership of the bed of a river, and sells land bordering on it with usufruct of the water as incident thereto, does not the state by virtue of its sovereignty retain the paramount right to use the water for all public purposes, and is not the usufruct incident to the riparian land inferior to this? Such interests in public waters as may be of general use to the public the state cannot grant away. Illinois vs. Illinois Central R. R. Co., 146 U. S. 387. This does not at all militate against the doctrine that as between private parties the rights of the bank owner are property, and cannot be infringed upon, nor as against the right to compensation in condemnation proceedings for this riparian right when the *riparian land* is taken for other uses; for except as against the paramount right of the state to use and divert the water for public purposes, the riparian right of user remains as property, analogous to a base fee in land, which is valuable and must be paid for

So it seems clear that the plaintiffs claim, that the sovereign right of the state in the Mississippi river is merely that of the right to navigate, is unfounded; that to sustain such a position, it must be based on the theory that the state has not original property in

the waters to the fullest extent that they are capable of ownership, but only a limited easement or servitude imposed on the fuller property in another; and herein is the fault of their argument. For the state owns the bed of the river and the full property in its waters, and is not confined to mere exercise of sovereignty and jurisdiction, as in the case of those New York waters ceded to Massachusetts and its grantees The trouble lies in not distinguishing cases where the bank owner also owns the bed, and where such ownerships are separate.

We submit, therefore, that we have demonstrated our proposition, that the state has the paramount right to divert the water of the Mississippi for public uses, without compensation to riparian owners.

II.

Plaintiffs maintain the mill dams in question only by license from the state, and their claim of injury depends upon alleged property rights arising solely and resting absolutely upon the maintenance of their dams. This right is but a license, revocable at any time by the state, and in so far as water power depends on it, it has been revoked by the dedication of the part of the water to the public use of the citizens of St. Paul.

Heretofore we have discussed the affirmative paramount right of the state to divert water from plaintiffs mill power for public use, assuming that they had ordinarily an absolute right to the use of the water secured by their dams. But plaintiffs have no such rights. It is conceded that the ordinary flow of the

river past plaintiffs' property is not affected, on a liberal estimate, more than one-sixteenth of an inch in depth at any time, which is inappreciable to the eye, and that, too, based on the assumption that drawing ten million gallons a day from a water area of sixteen thousand acres (Record, folio 42) immediately abstracts that amount from the Rice creek outlet, and therefore from the Mississippi river. So that it may be justly said that there is no real dimunition in the flow of the river. But by means of dams extending entirely across the river, plaintiffs have contrived to seal up all the water in the river at certain seasons of the year, and turn it into one main canal, thence through the mills and out again into the channel below, through tail races, where it is measured by wiers; and in this manner they claim, with the aid of the mathematics of their expert engineers, to be able to give an assignable money value in potential water power to every gallon or pailful of water passing down the stream. They have brought under their absolute control the free waters of the greatest thoroughfare of the continent. At their Midas touch its waters turn to gold, and when the inhabitants of a large city near by slake their thirst from one of the little tributaries of the great stream these plbaintiffs think they see the gold eagles, wont to be theirs, stolen from their grasp. Whence their exclusive title to this source of wealth, that even the state cannot claim its own? It is by virtue of their little strip of land fronting the river part of the way, and of their easement of flowage over the land higher up the stream, opposite the dams, but owned by others: so they claim. But

they have forgotten if ever so narrow a breach is made in these dams in the middle of the stream, all this water power so valuable to them flees away in a moment, and that the loosened waters seeking their own level would then soon "run as they were wont to run." The state owns the bed of the river in its sovereign character for public uses, and for public uses only. It cannot grant this away for private purposes any more than it can abdicate its sovereignty. On the general doctrine applicable to this we quote at length from the recent case of Illinois Central Railroad Company vs. State of Illinois, 13 Supreme Court Reporter, page 118, and generally known as the 'Chicago Water Front Case."

"That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under tide water by the common law, we have already shown; and that title necessarily carries with it control over the waters above them, whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them, may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the state may grant parcels of the submerged lands, and so long as their disposition is made for such

purpose, no valid objections can be made to the grants. It is grants or parcels of lands under navigable waters that may afford foundations for wharves, piers, docks and other structures in the aid of commerce, and grants of parcels which being occupied do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases

can be reconciled. General language sometimes found in opinions of the courts expressive of absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government, the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

We thus see clearly the source of plaintiffs water

power, for injury to which they claim damages. The power could not exist except for the dams as now constructed; the dams could not exist except by grant from the state; the state cannot grant such right to the exclusion of other public uses, and may, at all events, revoke the license or permission at any time. The state may order out the dams to-morrow, and the plaintiffs could not complain. They have positively no right to maintain these structures beyond the point of navigability, or as against a public use proposed to be made by the state, at all. Under this doctrine plaintiffs' charter (Special Laws 1856, Chapters 137 and 145) are merely revocable licenses as to the dams. There is no right, then, as against the state, or its representatives, the defendant in the case at bar, which plaintiffs have, or ever had; for, with their dams gone, there is no riparian right affected by the diversion of the water. The water would flow as before; and, with ever so narrow a channel in the middle of the river, any side dams would be of no avail for power. It logically follows from this that plaintiffs have no cause of action against the defendant.

It seems to us that this position proves itself. There is, however, a further and direct authority for it in the case of Union Depot Co. vs. Brunswick, 31 Minn. 300. The Supreme Court of Minnesota there say:

"At common law, the king, as representative of the nation, held in trust for them all navigable waters and the title to the soil under them. This was a sovereign or prerogative, and not a proprietary right. At the revolution, the people of each state became sovereign, and in that capacity held all these navigable wa-

ters and the soil under them for their common use, subject only to the rights since surrendered to the general government. Martin vs. Waddell, 16 Pet. 367; Mumford vs. Wardell, 6 Wall. 436. New states since admitted have the same rights in these navigable waters as the original states. Upon the admission of a new state, this right of eminent domain in them, which was temporarily held by the United States passes to the state. The patent from the United States of land on a navigable stream conveys to the patentee no title to the bed of the stream. This rests in the state as a sovereign right. Pollard v. Hagan, 3 How. 212, 222; Mumford v. Waddell, supra. * * * In this state it is the settled doctrine that the riparian owner has the fee to a low water mark. Schurmeier v. St. Paul & Pacific Ry. Co., 10 Minn. 59 (82); Brisbine v. St. Paul & Sioux City Ry. Co., 23 Minn. 114. But while he only has the fee to low water mark, he has certain riparian rights incident to the ownership of real estate bordering upon a navigable stream. Among these are the right to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landing piers and wharves on and in front of his land, and to extend the same therefrom into the river to the point of navigability, even beyond low water mark, and to this extent exclusively to occupy, for such and like purposes, the bed of the stream, subordinate only to the paramount public right of navigation. Dutton v. Strong, 1 Black, 22; Railroad Co. v. Schurmeier, 7 Wall. 272; Yates v. Milwaukee, 10 Wall. 497; Rippe v. Chicago, D. & M. Ry. Co., 23 Minn. 18; Brisbine v. St. Paul & Sioux City

Ry. Co., supra. These riparian rights are property and cannot be taken away without paying just compensation therefor. The state could not do it or authorize any one else to do it. Yates v. Milwaukee, supra; Lyon v. Fishmongers' Co. L. R., 1 App. Cases, 662; Brisbine v. St. Paul & Sioux City Ry. Co., supra.

"The term 'point of navigability' as used in the cases referred to is not perhaps capable of a fixed definition. Its meaning and application must vary with and depend upon circumstances. It is not to be understood in the narrow sense of being limited to that point where the water of the stream may be navigable for some purposes at certain stages of water. When it is said that a riparian owner may construct landings, etc., to the point of navigability, it must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of water, for any kind of navigation for which the stream is used, or for which it is adapted, provided, of course, it does not obstruct the paramount rights of the public. It must have reference not only to an ordinarily low stage of water, but also the size and kind of vessels which navigate the stream, and the kind of business done upon it. * * *

"Suppose, however, a riparian owner has unlawfully intruded into the water beyond the point of navigability as above defined, and filled up the bed of the stream beyond the point of navigability as above defined, and filled up the bed of the stream beyond that point, for the sole purpose of extending his possessions, and so as to obstruct and interfere with the public right of navigation. This would constitute a purpresture. The

public would have a right to abate it as a public nuisance. It would give no rights to the person who made it. It would not forfeit or destroy his riparian rights as they existed before, but he could claim no additional rights on account of it. When it is proposed to take his property for public use by the exercise of eminent domain, he can claim no additional compensation by reason of it. When condemned or taken, the corporation which acquired it would presumably have to remove it,—at least, there is no presumption that it would be allowed to remain—and therefore there is no reason why the party condemning the property should pay more for it on account of his unlawful encroachment upon public rights. The mere chance that it might be allowed to remain, cannot be made the basis of compensation to the person who made it."

III.

It will be noticed that plaintiffs' dam is not only in the river opposite their own land, but opposite land not owned by them for a distance of 650 to 900 feet up the river. (Record, folios 72-73 and 61-62.) For a length of 650 to 900 feet below the apex of the dams the companies have only the right of flowage on either bank.

They cannot, therefore, justify their claim to own all this water power, even granting them a right to dam up the stream entirely. The power depends largely on the head of the water, and on having the dam extend as far up the stream as possible. On no theory of riparian right can a structure extend into a stream

above or below the property owned by the riparian proprietor, and form a basis for a water power right in such proprietor, and a servitude on property higher up the stream. The mere right of flowage, or right to back water on to the upper land, would not confer this. So it would seem that license from the state must be the only ground which plaintiffs, even on their own theories, can urge in support of the upper 650 to 900 feet of the dam. Their water power is indivisible, and, if the main part of their structure is unlawful, or not the foundation of a riparian right in them, plaintiffs must fail for this reason also.

IV.

The right of the state is sovereign, not proprietary, as plaintiffs claim. Therefore, the state granted no property rights in the bed of the stream to plaintiffs, nor does the state attempt to grant such right to defendant. The state merely permitted plaintiffs to use the bed of the Mississippi river, with its incidental privileges, until it saw fit to limit these privileges by using them for itself. Defendant is not a grantee but a part of the state itself.

The above propositions are mainly covered by the argument under subdivision II. The board of water commissioners exist by virtue of the special laws referred to in the statement of the case. By those acts it appears that the board of water commissioners is only an executive board for the purpose of supplying water to the inhabitants of the city of St. Paul. Its members are appointed by the mayor; their salary is

paid by the city; the city engineer is ex-officio engineer of the board, and all bonds issued for the water works system under their supervision are bonds of the city of St. Paul.

Morton v. Power, 33 Minn. 521.

The water board's powers are for the benefit of the public, and it is a state agency on par with the board of health or fire department or police department, whose members are paid by the city. There seems to be no reason why the decision of Bryant v. City of St. Paul, 33 Minn. 289, and Grube v. City of St. Paul, 34 Minn. 402, should not likewise apply to the water board.

Snyder v. City of St. Paul, 51 Minn. 466; Dillon, Minn. Corp., Section 779.

The board of water commissioners are not authorized to charge water rates greater than is sufficient to defray the cost of the works and expenses. Sec. 31 Ch. 110, Sp. L. 1885.

Taking Bailey v. Mayor, 2 Denio 443, as construed in the later case of Darlington v. Mayor, 31 N. Y. 164, 200, it is held in New York that such a use of water is a public and governmental use.

V.

The use of the water by defendant was trifling and a reasonable use. Apart from all the other grounds urged by defendant in this case, the judgment of the court below should be sustained on the ground that the use made by the city, all things considered, is but a rea-

sonable use. We are met at the outset by plaintiffs' claim, that the city cannot by virtue of its riparian ownership of the land on the shore of Lake Baldwin divert water from the stream to supply a city at a distance. We may concede this might be true, did the right of the city to these waters rest on the riparian ownership only. But the defendant is a grantee or licensee of the state, and the question must be considered to be whether the state as the owner of a usufruct of the waters of Lake Baldwin may take for its use a reasonable amount of this water, as against riparian owners or others; for, as proprietor of the bed, it has a title to usufruct of the water in common with the riparian owners.

Each riparian proprietor has a right to the ordinary use of the water flowing past his land, for the purpose of supplying his natural wants, including the use of the water for his domestic purposes and for his stock. For these purposes he may, by the weight of authority, if necessary, consume all the water of the stream. He has also the right to use it for any other purpose, as for irrigation or manufactures; but this use is called an extraordinary use, and is subordinate to the right of others to consume all the water for domestic purposes.

Gould on Waters, Sections 205 and 206.

The rights plaintiffs claim in the water is of the second class,—the extraordinary use, and this right of use does not extend to all the water which would naturally flow down stream, but to such as remains after an abstraction of so much by others as is necessary to

a reasonable use of the water common to all. In the cases at bar the use by the city must be deemed a reasonable use, it being inappreciable to the eye in its effect on the river; and the right of user to this extent may be predicated on an interest in the water arising from ownership of the bed, as distinguished from the bank, and, therefore, within the limits of a reasonable user, just as permissible, even at a distance from the river, as the riparian right of use under the ordinary rules. Moreover, the use made of it is of a nature to which plaintiffs' uses are usually subordinate, viz., domestic use. As to reasonable uses, see

Gould on Waters, 208-209.

Red River Roller Mills v. Wright, 30 Minn. 249.

VI.

The use by plaintiffs was made of their riparian land; all the mill property is owned by others. Their use then is not strictly riparian and cannot give them a cause of action for diversion against an upper proprietor. See the reasoning of the majority opinion in

Stockport Water Works Co. v. Potter, 7 H. & N. 160; 1 H. & C. 300.

VII.

It is submitted that the water power in controversy is made possible only by convention of the parties holding land on each side of the stream; that either has the natural right to the flow of the water at its usual height past his land; and interference with this

right alone is the measure of an upper holder's liability. By making use of a water which neither alone could make, a property is brought into being which is not a natural riparian right, and a cause of action against another above for diverting water to interfere with this right alone, if such cause were sustained as valid, would impose a servitude on the upper property made possible only by a combination or contract between the lower proprietors, and therefore not sustainable, unless the ordinary rights of the owner above were previously condemned so as to prevent interference with such use. Unless contract relations between opposite owners prevent, each could tear down the dam on his side at any time, and this alleged right to water power would disappear.

VIII.

Defendant is a municipal corporation, a branch of the state government. The use of the water by defendant is a public use. The state has granted the right to defendant to obtain its supply of water from the lakes and streams in question.

It has been shown under subdivision IV that defendant is no nearly allied to the city of St. Paul, and in its creation so limited to the one purpose—the supplying of water at the mere cost of the same to the citizens of St. Paul, that no question can properly be made but that the defendant is a mere agency of the state to carry out this design on behalf of the public.

It is provided (Sec. 6 and 8, Ch. 110 Sp. Laws 1885) that the defendant may enter any county of the state

to obtain its water supply, and may draw water from any lake or creek, or divert the water of any stream, creek or body of water. The provision of compensation for diversion of water must be held to apply only where rights exist which require compensation, as against the state.

Fay v. Salem & Danvers Aqueduct Co., 111 Mass. 27.

IX.

DEFENDANT FURNISHES WATER ONLY FOR PUBLIC USE.

The water coming from the Lake Phalen system is distributed through the older settled portions of the city—through the business portion. No water was drawn from any other source than Lake Phalen until after the purchase of the water works by the city. This was after 1883 and by the amendatory act of 1885, (Special Laws, chapter 110, section 5 Et. Seq.) the defendant was authorized and empowered to add to its source of supply, and to draw water from any lake or creek and to do any act necessary to furnish an adequate supply of water for the use of the city, and prior to the construction of the water works so as to connect with the lakes lying in the northwesterly direction from the city, there was no water taken from any source except Lake Phalen, and as the business portion of the city had already been furnished with water from this lake, it is a fair inference that since the construction of the new system the larger portions of the water still taken from Lake Phalen is consumed in the business portion of the city. The evidence does not show

the use of any water for any purposes other than those public uses to which water is generally devoted in the larger cities, through the department or officer having in charge the water works system of the city.

On the other hand, if the furnishing of water for the purpose of running the organs of three churches on Sundays is not a public use, there is nothing in the record showing where the water used for such purpose comes from, and the plaintiffs could not seek any relief on that ground unless it is shown that the water so furnished was pumped from Lake Baldwin, and the court will not make such an inference, and even if those churches are connected with the Lake Baldwin system, no court would grant any relief unless it were shown how much water was used for that purpose, and that plaintiffs suffered damage in consequence of that particular use of that particular amount of water. And herein is the difficulty of plaintiffs' position in respect to the alleged use of water for purposes not public. If such use there was, there is absolutely no evidence as to any particular amount of water used for purposes claimed by plaintiffs not to be public uses. How can a court grant relief in such a case if the court should be of the opinion that some of those uses are not public? The business portion of the city is supplied with water from Lake Phalen and if all the water coming from this source were devoted to uses not public, the plaintiffs could not complain.

How much water pumped from Lake Baldwin is used for purposes claimed by the plaintiffs to be unauthorized the record does not show. Is the amount

infinitesimal, or is it a few hundred gallons a day? Who can tell? This court cannot, nor does there exist any basis for the assessing of damages occasioned by the diversion of the waters for those supposed unauthorized uses. The plaintiffs failed to show that those waters were used for an unauthorized purpose, and it is well they have, even if some of the water had been used for purposes not authorized, for the great claim of the plaintiffs has been that there could be no use of these waters for public purposes without compensation, and having failed in that respect, they should not be permitted to raise in this court an incidental matter which is hardly made an issue by the pleadings. They did not institute these actions to restrain the use of a few gallons of water on the ground that such use was unauthorized, nor did the trial court proceed upon any such theory of these cases. Plaintiffs brought these actions to recover compensation for the water diverted and used for public purposes, and if they cannot maintain them on that ground, they should not be entitled to any relief on any other ground.

Respectfully submitted,

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